

## **REMARKS**

### **A. BACKGROUND**

The present Amendment is in response to the Office Action mailed December 23, 2009. Claims 2-10 and 14-19 were pending and rejected in view of cited art.<sup>1</sup> Claims 6 and 17-19 are canceled, claim 2 is amended, and new claims 20-39 are added. Claims 2-5, 7-10, and 14-16, and 20-39 are now pending in view of the above amendments, with claims 2, 20, and 29 being independent.

Reconsideration of the application is respectfully requested in view of the above amendments to the claims and the following remarks. For the Examiner's convenience and reference, Applicant's remarks are presented in the order in which the corresponding issues were raised in the Office Action.

Please note that the following remarks are not intended to be an exhaustive enumeration of the distinctions between any cited references and the claimed invention. Rather, the distinctions identified and discussed below are presented solely by way of example to illustrate some of the differences between the claimed invention and the cited references. In addition, Applicant requests that the Examiner carefully review any references discussed below to ensure that Applicant's understanding and discussion of the references, if any, are consistent with the Examiner's understanding.

### **B. REJECTION UNDER 35 U.S.C. § 112, SECOND PARAGRAPH**

The Office Action rejected claims 2-10 and 14-19 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In response, independent claim 2 is amended to recite, in part, "engaging tissue adjacent the distal end of the elongate member with a plurality of tissue engaging elements on the closure element" (emphasis added). In view of the amendment, Applicant respectfully requests withdrawal of the rejection under Section 112.

### **C. PRIOR ART REJECTIONS**

#### **I. REJECTION UNDER 35 U.S.C. § 103**

The Office Action rejected claims 2-5, 7-9, 14, and 15 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,192,302 (*Kensey*) in view of U.S. Patent No. 5,593,412 (*Martinez*). Applicant respectfully traverses in view of the amendments presented herein and in

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<sup>1</sup> Although the prior art status of the cited art is not being challenged at this time, Applicant reserves the right to challenge the prior art status of the cited art at any appropriate time, should the need arise. Accordingly, any arguments and amendments made herein should not be construed as acquiescing to any prior art status of the cited art.

view of the following and respectfully submits that the independent claims as presented for reconsideration are not anticipated nor made obvious by *Kensey* or *Martinez*, either singly or in combination with any other reference of record.<sup>2</sup>

The Office Action indicated that claims 6, 10, and 16-19 were rejected under Section 112 and did not reject those claims under another Section. In view of this and the amendments presented herein, Applicant respectfully submits that independent claims 2, 20, and 29 are neither taught nor made obvious in view of *Kensey* or *Martinez*, whether individually or collectively. As amended and presented herein, (i) independent claim 2 includes the limitations of dependent claim 6, (ii) independent claim 20 includes the limitations of claim 17 and independent claim 2 as presented in the previously filed Office Action response, and (iii) independent claim 29 includes the limitations of dependent claims 9 and 10 and independent claim 2 as presented in the previously filed Office Action response.

In view of the amendments presented herein, Applicant respectfully submits that independent claims 2, 20, and 29, and dependent claims 3-5, 7-10, and 14-18, 20-28, and 30-39, are neither taught nor made obvious in view of *Kensey* or *Martinez*, whether individually or collectively, and Applicant respectfully requests that the rejection under Section 103 be withdrawn.

**D. CONCLUSION**

In view of the foregoing, Applicant respectfully submits that the other rejections to the claims are now moot and do not, therefore, need to be addressed individually at this time. It will be appreciated, however, that this should not be construed as Applicant acquiescing to any of the purported teachings or assertions made in the last action regarding the cited art or the pending application, including any official notice. Instead, Applicant reserves the right to challenge any of the purported teachings or assertions made in the last action at any appropriate time in the future, should the need arise. Furthermore, to the extent that the Examiner has relied on any Official Notice, explicitly or implicitly, Applicant specifically requests that the Examiner provide references supporting the teachings officially noticed, as well as provide the required motivation or suggestion to combine references with the other art of record.

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<sup>2</sup> Any amendments to claims other than those which are expressly relied upon in overcoming the rejections on art have been made simply to insure consistency in claim language, to correct typographical or grammatical errors, or to correct other errors of a formal, non-substantive nature, but not to otherwise narrow the claims in scope for any reason.

For at least the foregoing reasons, Applicant respectfully submits that the pending claims are neither anticipated by nor made obvious by the art of record. In the event that the Examiner finds any remaining impediment to a prompt allowance of this application that may be clarified through a telephone interview, the Examiner is requested to contact the undersigned attorney.

Dated this 23rd day of March, 2010.

Respectfully submitted,

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